Supreme Court of the United States

OCTOBER TERM, 1946

PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSE HALVEY,
Petitioner,

—against—

JOHN F. HALVEY, Custodian of JOHN ARTHUR HALVEY,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

This court granted certiorari on asserted conflict with the determinations in *Davis* v. *Davis* (305 U. S. 32) and *Williams* v. *North Carolina* (317 U. S. 287; 325 U. S. 226) and on asserted repugnancy to the constitutional guaranty of full faith and credit.

Statement of Matter Involved

On April 10, 1937 petitioner and respondent were married in New York. On February 4, 1938 the infant son, whose custody is in issue, was born in New York.

Petitioner and respondent since their said marriage and their infant son since his birth, lived together in New York, until April 12, 1944, when petitioner, without the knowledge or consent of respondent, left for Florida with the child.

Respondent remained in New York. Petitioner lived in Florida with a married sister and the latter's husband.

On February 22, 1945, petitioner commenced suit for divorce in Florida apparently on the ground of cruelty, a ground not recognized in New York. Service was effected on respondent by publication. He was not a resident of Florida; he was not served within Florida and he did not appear in the action.

On April 19, 1945 during the pendency of the Florida cause, respondent, without the knowledge or consent of petitioner, peaceably took the child out of Florida and brought him back to New York.

On April 20, 1945 the Florida divorce decree was filed and on April 21, 1945, it was recorded.

By that decree, petitioner was granted an absolute divorce from respondent and she was awarded custody of the child. There is no finding that respondent was an unfit person, or that petitioner was fit to care for the child. There is no showing that any testimony was adduced on that question.

On May 2, 1945 petitioner came back to New York, and a writ of habeas corpus was issued, on her petition under section 70 of the New York Domestic Relations Law, to inquire into the detention of the child. On May 4, 1945, the matter came on for hearing before the New York Supreme Court. Both petitioner and respondent appeared in person and by counsel. The child was also present in court. After a complete hearing at which all the facts were adduced and after an interview with the child, the court entered an order (R. 3) determining that the custody of the child remain with the mother, giving the father certain rights of visitation, and requiring petitioner to post a $5,000 bond to insure compliance with its terms.

The opinion (R. 56) upon which the order is based is officially reported in 185 Misc. 52. Petitioner appealed to the Appellate Division of the Supreme Court, where the order was affirmed (269 App. Div. 1019). Petitioner further appealed to the Court of Appeals. The arguments of petitioner in that court were directed solely to the proposition that the custody provisions of the Florida divorce decree were entitled to full faith and credit, which was not given to it by New York, since that there was no change in circumstances after rendition of the Florida decree. The Court of Appeals unanimously affirmed the determination of the Appellate Division (295 N. Y. 836).

Apparently this Court has not yet determined whether a custody decree is within the full faith and credit clause.

ARGUMENT

POINT I

The custody portion of the Florida decree is not entitled to full faith and credit because there was no jurisdiction either over the subject matter or over the person of the respondent to enable Florida to enter that portion of the decree.

Florida granted petitioner a divorce on constructive service. Defendant was never a resident of Florida but was at all times a resident of New York. He was not served within Florida and did not appear in the action. Since respondent has not attacked the *bona fides* of the petitioner's domicile in Florida, that portion of the decree which grants petitioner a divorce is valid and entitled to full faith and credit. (*Williams* v. *North Carolina*, 317 U. S. 287.)

However, at the time of the rendition of the decree on April 20, 1945, both respondent and the child were not within the jurisdiction of the Florida court. Florida had no authority to award custody of the child to petitioner. (*State ex rel. Rasco* v. *Rasco*, 139 Fla. 349, 190 So. 510; *Seeley* v. *Seeley*, 30 App. D. C. 191, cert. den. 209 U. S. 544; *Kline* v. *Kline*, 57 Iowa 386, 10 N. W. 825; *Harris* v. *Harris*, 115 N. C. 587, 20 S. E. 187; *Brandon* v. *Brandon*, 154 Ga. 661, 115 S. E. 115; *Wilson* v. *Wilson*, 136 Va. 643, 118 S. E. 270; *De La Montanya* v. *De La Montanya*, 112 Cal. 101, 44 Pac. 345; *Steele* v. *Steele*, 152 Miss. 365, 118 So. 721; *Payton* v. *Payton*, 29 N. M. 618, 225 Pac. 576; *Rodgers* v. *Rodgers*, 56 Kan. 483, 43 Pac. 779; *Duryea* v. *Duryea*, 46 Ida. 412, 269 Pac. 987.)

When the full faith and credit clause of the Constitution is invoked to compel enforcement of a judgment or decree in another state, the question of the jurisdiction of the court over either the person or the subject matter is always open to inquiry (*Milliken* v. *Meyer*, 311 U. S. 457, 462; *Haddock* v. *Haddock*, 201 U. S. 562; *Natl. Exchange Bank* v. *Wiley*, 195 U. S. 259; *German Savings & Loan Assn.* v. *Dormitzer*, 192 U. S. 125.

In *Brandon* v. *Brandon* (*supra*), the facts were exactly the same as in our case. There the husband and wife who lived in Ohio, separated. The husband went to Georgia and took the child with him. Then the wife came to Georgia and took the child with her back to Ohio. Thereafter she filed suit for divorce in Ohio. Service on the husband was by publication.

After the institution of the divorce action, but prior to the rendition of the decree, the husband went to Ohio and, while the wife was away from home, took the child and brought him back to Georgia.

Ohio granted a divorce to the wife and awarded her custody of the child. She then came to Georgia and instituted habeas corpus proceedings. There was no change of circumstances between the time of the rendition of the decree and the institution of the habeas corpus proceedings. Georgia held that (1) the child's presence in Ohio at the time of the institution by the wife of the divorce action was only temporary and did not give Ohio jurisdiction to decree custody; (2) so much of the divorce decree as awarded custody to the mother was void for want of jurisdiction; (3) the custody portion of the divorce decree was not binding on the father and did not preclude him from asserting his legal right to the child's custody.

In our case the parties were married in New York. The matrimonial domicile was in New York. The child was born in New York. In April 1944 petitioner left her husband and, without his knowledge or consent, took the child with her to Florida (R. 56). Under these circumstances, the residence of the child in Florida with the mother was only temporary. The domicile of the child remained with the father in New York.

The divorce action is one in equity (5884, Compiled General Laws, Florida, 1927), which speaks as of the time of the decree. The Florida decree was rendered on April 20, 1945 and recorded on April 21, 1945 (R. 54). The day before the rendition of the decree, on April 19, 1945 the father took the child out of the jurisdiction of Florida (R. 16-17). Therefore, at the time of the rendition of the decree, Florida did not have jurisdiction to decree custody, since there was no jurisdiction over the person of defendant, the domicile of the child was at all times in New York, and the child himself was physically outside the jurisdiction.

The *Brandon* case was cited with approval in the majority opinion of this court in *Yarborough* v. *Yarborough* (290

U. S. 202, at p. 210) and by Florida in *State ex rel. Rasco* v. *Rasco* (139 Fla. 349, 190 So. 510).

If it be said that the child was outside the jurisdiction of Florida at the time of the rendition of the decree without the knowledge or consent of petitioner and that respondent can gain no right by his act of removing the child from Florida for the purpose of defeating the decree entered in that jurisdiction, it is also the fact that the child was in Florida at the time of the institution of the divorce action, away from his domicile and that of his father without the father's knowledge or consent, and petitioner can gain no right by her act of removing the child from New York to Florida for the purpose of giving Florida jurisdiction.

Custody Not Essential to Cause of Action for Divorce

A divorce action and the decree resulting therefrom have several different aspects. Insofar as the action operates on the matrimonial status of the parties, it is not a mere *in personam* action. (*Williams* v. *North Carolina*, 317 U. S. 287, 297-298.) Accordingly, the *Williams* case held that, in the absence of an attack on the domicile of the plaintiff in the divorce action, a divorce decree granted in one state, even though based on constructive service, was entitled to full faith and credit.

There are, however, several incidents to a cause of action for divorce which are not essential parts of the cause of action. One is the demand for custody. (§4993, Compiled General Laws, Florida, 1927.) Another is the demand for alimony.

It is well established that as to alimony and costs, the action for divorce is *in personam*. (*People* v. *Baker*, 76 N. Y. 78; 2 Bishop, *Marriage, Divorce, and Separation*,

§23; 2 Black, *Judgments*, §§925, 933.) Therefore, while a divorce decree based on constructive service may be valid as affecting the marital status, of the parties, it does not bind the defendant as to sums allowed for alimony and costs where the judgment was rendered in the state in which the wife is a resident citizen, against her non-resident husband, who has not appeared in the action and has not been served with process in the state in which the action was brought. (*Rigney* v. *Rigney*, 127 N. Y. 408, revd. on other grounds, *sub nom. Laing* v. *Rigney*, 160 U. S. 531; *Beard* v. *Beard*, 21 Ind. 321; *Prosser* v. *Warner*, 47 Vt. 667; *Hardin* v. *Alden*, 9 Me. 140; *Garner* v. *Garner*, 56 Md. 127; *Van Storch* v. *Griffin*, 71 Penn. St. 240.)

The judgment for alimony and costs cannot be supported on the ground that it is a mere incident of and subordinate to the right to divorce, and the jurisdiction which is sufficient to support a decree changing the marital status of the parties will not sustain a judgment for alimony and costs. (*Rigney* v. *Rigney, supra.*)

Likewise, it should be held that as to custody the action for divorce is *in personam.* Therefore, while the divorce decree based on constructive service may be valid as affecting the marital status of the parties, it does not bind defendant as to custody of the child, where the judgment was rendered in a state in which the wife is a resident citizen, against her non-resident husband, who has not appeared in the action and has not been served with process in the state in which the action was brought.

In *Dekraft* v. *Barney* (2 Hayw. & H. 405, Fed. Cas. #18,288) a decree of divorce rendered in Iowa in favor of the wife, which awarded custody of the children to her, was held not conclusive or even admissible as evidence that the father was an unfit person to have custody of the children in a subsequent proceeding in the District of Columbia on

the ground that, the decree rendered upon constructive service of process against the husband, a non-resident of Iowa, did not have the effect of personal judgment or decree.

The custody portion of a divorce decree requires control by the court over the persons of the parties so that it may enforce its commands with respect to each. The custody provision resembles in this respect an injunction, in that it enjoins the party having custody to deliver the child to the party entitled to custody at the appointed time and further enjoins the one not entitled to custody at the time in question not to molest or interfere with either the child or the person who is entitled to custody. It is well settled that an injunction is a personal decree because it operates on the person of the defendant by commanding him to do or desist from certain action. An injunction obtained by constructive service on a non-resident is not entitled to the protection of the full faith and credit clause. (*Comfort* v. *Comfort*, 17 Cal. 2nd 736, 112 Pac. 2d 259, 262.)

Child or Anyone in His Behalf May Challenge Custody Portion of Decree

Long ago (*Matter of Bort*, 25 Kan. 308), Mr. Justice Brewer, afterwards a Justice of this Court, criticized a claim similar to that of petitioner (invoking the benefit of the full faith and credit clause to a foreign divorce decree which included custody of a child and insisting that, unless some subsequent change in the relative position and fitness of the respective parties is shown, the custody directed in the divorce decree cannot be changed) as resting on the assumption that parents have some property right in the possession of their children, a claim which was repudiated.

It has been held that the minor child of parents divorced in another state can challenge the validity of the foreign

decree, even though the parents themselves could not. (*Matter of Lindgren*, 293 N. Y. 18.) If the child can maintain an action of that nature, certainly he may challenge the custody portion of the decree. It makes no difference that the proceeding is brought on in name, by the parent.

The prime consideration is the welfare of the child. The authority of the court is so broad that custody may be fixed even in disregard of the legal rights of parents, where the welfare of the child requires it. A child is not a chattel which must be restored to its lawful owner in all circumstances. Like the parent, the child has rights, and the strict legal rights of parents can only be enforced with proper regard to the best interests of the child.

The law does not visit on the child the disability imposed on parents to attack a decree. The rights asserted in this proceeding are not property rights to which either parent is entitled. The child was not a party to the Florida divorce action. Accordingly, the judgment there entered was not conclusive upon him or upon rights asserted in New York on his behalf. In these circumstances, the child as a third party may challenge the validity of the custody portion of the Florida decree. (See *Olmsted* v. *Olmsted*, 190 N. Y. 458, 466, 467, affd. 216 U. S. 386; *Andrews* v. *Andrews*, 188 U. S. 14, 39; *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128; *Milliken* v. *Meyer*, 311 U. S. 457, 462.)

If the minor child is not a party to the divorce action and can never be bound by the custody provisions of the foreign decree and the only inquiry in another state is what is best for the child's welfare, a custody decree should never be given full faith and credit. (*Matter of Bort*, 25 Kan. 308.)

Child Domiciled in New York When Decree Was Made

The subject matter or *res* here involved was the child and its custody. In the absence of jurisdiction over the child, the decree was void and not entitled to recognition insofar as it purported to deal with the child's custody. A court's jurisdiction with respect to a child's custody depends on its domicile when the decree was rendered. (*Restatement, Judgments*, §33; *Restatement, Conflict of Laws*, §117.) The law of the domicile governs the status of a person. (*Lamar* v. *Micou*, 112 U. S. 452, 469-470.)

An infant cannot change his own domicile. The domicile of an infant is the domicile of the father. (*Lamar* v. *Micou*, *supra*, at p. 470; *Kennedy* v. *Ryall*, 67 N. Y. 379, 386.) Under Florida law the legal domicile of the child was that of the father, he not having consented to any change of domicile on the part of either the mother or the child. (*Beckman* v. *Beckman*, 53 Fla. 858, 43 So. 923.) The child's domicile was that of his father in New York and his domicile continued to be in New York at all times. He was not capable by his own act of changing his domicile.

The child's temporary residence in Florida when the divorce action was begun did not effect a change of his domicile. (*Yarborough* v. *Yarborough*, 290 U. S. 202, 211.) While the Justice of the New York Supreme Court who tried the custody proceeding in that state made no finding as to the child's domicile at the time of the rendition of the decree (R. 57), the undisputed facts establish that New York was the child's domicile.

The reason for the rule that the domicile of a minor child is that of his father is that the father is entitled to his custody and services, and is responsible for his tutelage, discipline, and support of the child. The doctrine as to domicile rests upon the reciprocal rights and duties of

father and child. It obtains even though the parents may be living apart. Thus while a married woman may acquire a domicile different from that of her husband in appropriate circumstances, in the absence of some neglect of parental duty on the part of the father, or some statute, the domicile of minor children remains that of the father. (*Glass* v. *Glass*, 260 Mass. 562, 157 N. E. 621, citing many cases.)

The domicile of the child is with the parent in whom legal custody and the right of control are vested. At common law the father had the superior legal right to the custody of the minor child. The Florida statute (5884, Compiled General Laws, Florida, 1927) is to the effect that the mother jointly with the father shall be the natural guardian of their children during infancy. This statute makes the mother the "joint" guardian of her children with her husband. To say that the domicile of the child was in Florida because the mother took him there without the knowledge or consent of the respondent, whose domicile remained at all times in New York, would be to give the wife legal custody of the child of the parties while being separated from her husband against his wishes and to give her the several and exclusive control of the child, and not a control of the child jointly with the father, as the statute commands.

The statute would then be made to work an entire loss of the common law rights of the father, at the option of the wife, if by any means she could possess herself of the child. Her rights are made "equal" with the husband, not paramount or superior, and can only be enjoyed and exercised under circumstances in which the husband's equal rights may be secured to him. When they are separate from and independent of each other, the joint guardianship cannot be exercised and the husband is remitted to his common law rights, which give him a superior legal right to the child's custody.

Florida has determined that, in the absence of a finding that the father was an unfit person to care for his child (and there is no such finding in the instant Florida decree), the father is entitled as a matter of right to the custody of the child. (*Hopkins* v. *Hopkins*, 84 Fla. 500, 94 So. 157; *Gedney* v. *Gedney*, 117 Fla. 686, 158 So. 288.) So that, under Florida law, the domicile of the child was with the father in New York when the Florida court assumed to act.

A court granting a divorce cannot award to either party the custody of a child until the child is domiciled in the state. (*Restatement, Conflict of Laws*, §146, comment *c*.) Since the child was not physically present in the state when the decree was rendered, even temporary custody could not have been awarded. A state which is the temporary residence of a child, not the domicile, cannot confer the right to custody. (*Lanning* v. *Gregory*, 100 Tex. 310, 99 S. W. 542.) A decree for custody rendered in a state where the child is not domiciled is void for lack of jurisdiction. (*Milner* v. *Gatlin*, 139 Ga. 109, 76 S. E. 860; *Duryea* v. *Duryea*, 46 Ida. 512, 269 Pac. 987; *Weber* v. *Redding*, 100 Ind. 448, 163 N. E. 269; *Griffin* v. *Griffin*, 95 Ore. 78, 187 Pac. 598.)

Just as a divorce decree seeking to apportion the rights of the parties to realty is not conclusive with respect to land outside the state (*Fall* v. *Eastin*, 215 U. S. 1), so will the divorce decree seeking to determine the right of the mother to custody with respect to a child domiciled outside Florida not be conclusive.

The full faith and credit clause may not be used to compel New York to subordinate its own statute (§70, Domestic Relations Law) dealing with custody of children concerning which New York is competent to legislate to the Florida statute (§4993, Compiled General Laws, 1927).

One who challenges the power of a state to enforce in its own courts its own statutes on such ground carries the burden of showing that of the conflicting interests involved those of the foreign state are superior to those of the forum. (*State Farm Ins. Co.* v. *Duell*, 324 U. S. 154, 160; *Alaska Packers Assn.* v. *Industrial Accident Commissioner*, 294 U. S. 532, 547, 548.) That burden has not been carried here. All that has been shown is that the interests of both states are the same. The paramount interests of each is the welfare of the children. (*Hernandez* v. *Thomas*, 50 Fla. 522, 39 So. 641; *People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317, 322.) The interest of Florida is not superior to that of New York in this regard. It is New York's prerogative to select the appropriate means of protecting infants resident within its borders and Florida's directives cannot control New York.

In Any Event There Was No Custody Change

An examination of the opinion of the Justice who conducted the hearing in New York (R. 58) and of the order entered thereon (R. 3) shows that the custody provisions of the Florida decree were not changed. Custody of the child still remains with the petitioner.

What the order does, is to recite in detail the reasonable rights of visitation of the respondent. Petitioner chooses to call the particularization of the times of visitation a new grant of custody. That does not make it so. The times of visitation are not being attacked as unreasonable or as an abuse of discretion. Indeed, they cannot be so attacked.

The divorce decree did not divest respondent of his fatherhood. The child is still his child, notwithstanding its custody was awarded to the mother in Florida. A parent against whom an adverse judgment of divorce has been

rendered possesses certain natural rights with respect to his child although custody is given to the other parent. One of these, is the right of access to his child, and the exercise of this right, under reasonable restrictions as the circumstances warrant, should not be withheld.

It was not shown in Florida or in New York that the father's association with the child would not be for the good of the child. The divorce decree contains no express provision barring a right of visitation and there is no finding of facts to justify such provision. New York merely fixed the times which it considered reasonable for the husband to have access to his child. (See *Burge* v. *Burge*, 88 Ill. 164; *Jacquet* v. *DiSimone*, 175 La. 617, 143 So. 710.)

Williams v. North Carolina Not Controlling

There were several "intensely practical considerations" which emphasized the necessity for holding that a divorce granted in the state of domicile of one spouse based on constructive service on the other, resident in a sister state, was entitled to full faith and credit. It would bring considerable disaster to innocent second spouses; it would bastardize the offspring of the second marriage; it would encourage collusive divorces. (*Williams* v. *North Carolina*, 317 U. S. 287, 301.) None of these considerations is here present. Assuming that the custody provisions of the decree are changed, neither spouse is made a bigamist; offspring are not bastardized; and collusive divorces are not encouraged.

The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states here involved. The question of marital capacity will often raise an irreconcilable conflict between the policies of the two states. One must give way in the larger interest of the federal union. But the same conflict

is not present when it comes to custody. The paramount interest of both states is the welfare of the child. The jurisdictional foundation for a decree in one state capable of foreclosing an inquiry into the welfare of the child is different from that required to alter the marital status with extraterritorial effect. (See concurring opinions of Mr. Justice Douglas, in which Mr. Justice Black joined, and the concurring opinion of Mr. Justice Rutledge in *Esenwein* v. *Commonwealth*, 325 U. S. 279, 282-283.)

POINT II

The custody portion of the Florida decree is not final and, therefore, is not entitled to full faith and credit.

The custody portion of the divorce decree is not final, but is in its nature temporary, provisional, and interlocutory. The Florida statute provides (§4993, Compiled General Laws, 1927) that, in a divorce suit, the court shall have power "at any stage of the cause" to make such orders touching the care, custody, and maintenance of the children of the marriage as may be fit, equitable, and just, and as their best interests may require.

Power is thus reserved in the statute to alter and modify the decree regarding custody at any time. (*Frazier* v. *Frazier*, 109 Fla. 164, 147 So. 464; *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392.)

As regards alimony, this court has held that a decree therefor is not entitled to full faith and credit where by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree to such an extent that no absolute or vested right at

taches to receive the installments ordered by the decree to be paid, even though no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due. (*Sistare* v. *Sistare*, 218 U. S. 1, 17.) Where enforcement of alimony is subject to the discretion of the court which rendered it, which might at any time alter it, that portion of the decree is not entitled to full faith and credit. (*Lynde* v. *Lynde*, 181 U. S. 187; *Sistare* v. *Sistare*, *supra*, at p. 16.)

As regards custody, the portion of the decree falls into the same category. The matter of the custody of a child involved in a divorce suit is always "in the bosom of the court of whom the child is a ward." It is not final and conclusive against subsequent modification. For that reason the custody portion of a divorce decree is never entitled to full faith and credit in a sister state. (*Matter of Ashley*, 113 Or. 43, 231 Pac. 153; *People ex rel. Multer* v. *Multer*, 107 Misc. 58, 63, 65.) This is not a disregard or impeachment of a judicial proceeding of a sister state, but is giving to it all the faith and credit it possesses there.

POINT III

Assuming that the custody portion of the Florida decree was entitled to full faith and credit, New York gave the Florida decree all the faith and credit to which it was entitled.

The principal contention of the petitioner in the New York courts was that the law in New York commanded that, unless the respondent could show a change of circumstances since the entry of the Florida decree, New York must give effect to the Florida decree. That contention overlooks the entire basis of the full faith and

credit clause. It is not a New York decree to which petitioner contends full faith and credit should be given. It is a Florida decree. The determining question is, therefore, not what is the New York law but what is the Florida law, with respect to the right of a court to change a custody decree. The full faith and credit clause requires that New York give to the Florida decree all the force and credit which the Florida decree possesses in Florida and no more.

In Florida a custody decree may be changed on altered conditions arising since the decree *or* because material facts bearing on the question of custody existing at the time of the decree were unknown to the court. (*Frazier* v. *Frazier*, 109 Fla. 164, 147 So. 464.)

So in *Meadows* v. *Meadows* (78 Fla. 576, 83 So. 392) a divorce decree gave custody of a minor child to the mother. The father petitioned for a change of custody. The lower court sustained a demurrer to that petition on the ground that, in the absence of a showing of a change of circumstances, the awarding of the custody of the child by the final divorce decree was *res judicata* as to the conduct of the mother prior to the rendering of the decree. On appeal that order was reversed because the custody of a minor child was a proper consideration for the chancellor at any time, even if facts in issue could have been considered at a previous hearing, if such facts were not presented or considered at a former hearing.

In our case respondent did not appear in the divorce action. There is no showing as to what testimony was taken on the subject of the petitioner or respondent being fit persons to have the custody of the child. There is no finding that respondent was an unfit person. Respondent did not appear in Florida and there was no testimony or evidence presented in his behalf as to the fitness of both

parents. Such evidence was presented in the New York court where both parents appeared in person and by counsel. In addition, the Trial Judge spoke to the child and obtained an expression of his desires on the subject. Upon a consideration of these additional facts, all of which were unknown to the Florida court, New York made a direction as to custody, which is not, and cannot in this court be, attacked as an abuse of discretion. The additional facts were not presented or considered by the Florida court at the time of the rendition of its decree. Under such circumstances, Florida had the power to change the custody decree. If Florida has discretion to modify the custody decree New York has like power.

Where a decree rendered by one state is embraced by the full faith and credit clause, that constitutional provision commands the other state shall give to the decree the force and effect to which it was entitled in the state where rendered. (*Haddock* v. *Haddock*, 201 U. S. 562, 567; *Harding* v. *Harding*, 198 U. S. 317.) If the courts of that state have authority in their discretion to modify the decree at any time, even in the absence of a change of circumstances, the courts of another state have like power. (*Sistare* v. *Sistare*, 218 U. S. 1, 17.)

POINT IV

The Florida decree was not binding on the child nor on the court as *parens patriae*. Assuming that force may be given to the Florida decree as long as the child lived in Florida, when he came to New York, New York was not bound by the Florida decree.

New York took jurisdiction of this proceeding under §70 of its Domestic Relations Law, which gives to the court, the duty of determining custody of children within the state. The New York court is thereby admonished in peremptory language to determine custody in accordance with the best interest of the child.

The Florida decree did not diminish the prerogative of the New York Supreme Court as *parens patriae*. (*People ex rel. Herzog* v. *Morgan*, 287 N. Y. 317.) By means of that paternal jurisdiction the court was to provide for the best interests of the child after the manner of a wise, affectionate, and prudent parent. (*Finlay* v. *Finlay*, 240 N. Y. 429.)

The provisions of a decree as to custody of a child are distinguishable, in respect of recognition and enforcement, from the provision of the decree terminating the marital relationship, as well as from the provisions of the decree for alimony, in that custody involves the welfare of children, who are not parties to the proceedings in which the decrees are rendered.

While the Florida decree might determine the marital status of the parties as between themselves, whether the custody provisions of the decree are *res judicata*, as between father and mother, are beside the issue, in this habeas corpus proceeding, which is whether that decree can bind the New York court as against the infant boy in deter-

mining where his custody should go, he being now a resident of New York and subject to its jurisdiction.

Each state has the power to determine the status of persons within its jurisdiction and the Florida court had no power to make any order with respect to the boy within the jurisdiction of the New York court which would be binding on him. (*Matter of Erving*, 109 N. J. Eq. 294, 157 A. 161.) The state as *parens patriae* has an interest in the proper training and education of its children. The state has the right to insist that natural parents fulfill their obligations not only to their children, but to the state. To this extent the state is interested.

The question involved is not so much the relative rights of the parents as between themselves, as the rights of the child. He was not a party to the divorce action and is not bound by its decree. Being a minor, he could not act for himself, and the court acts upon the petition and evidence produced in his behalf. Whatever orders the court may make are for the benefit of the child, whose interest and welfare are first considered, even as against the natural claims of the parents themselves. The decree of the court of another state ought not to be regarded as binding on the state itself, or the child, where its welfare is at stake. (*Matter of Stewart*, 77 Misc. 524.)

In accordance with this doctrine, despite the fact that there was no variance in circumstances which would justify a change in the custody arrangements agreed to by the parents and adopted by incorporation in a foreign divorce decree, New York has decided that a foreign judgment of divorce does not prevent New York from considering evidence as to the welfare of its infant ward resident in New York. (*Matter of Bull*, 266 App. Div. 290, affd. 291 N. Y. 792.) That is in accordance with the general rule.

When the child ceases to be a resident of the state in which its custody has been awarded and becomes domiciled in, or a resident of, another state, its custody in the latter state and the recognition and enforcement of the sister state decrees are matters closely connected with the right of sovereignty in such state to protect and promote the welfare both of society and of the individual members thereof within its borders.

Each state reserves to itself the right to judicial determination of the status of its inhabitants. When that status becomes a matter of concern of organized government, it necessarily follows a state will not yield to a foreign jurisdiction, the exclusive right to determine the status of its residents. Accordingly, in such circumstances the sister-state decree is without extraterritorial effect.

In any event, such effect may be denied it, on the ground that the child has become a domiciliary or resident of the state in which such recognition or enforcement is sought. Even though conclusive force may be given to the determination of the state where the child resides so long as that residence continues, upon a change of residence the question will be open in the state to which the change is made, and such decree is without force in the foreign jurisdiction into which the child is removed. (*Matter of Erving*, 109 N. J. Eq. 294, 157 A. 161; *Milner* v. *Gatlin*, 139 Ga. 109, 76 S. E. 857; *Steele* v. *Steele*, 152 Miss. 365, 118 So. 721; *In Re Alderman*, 157 N. C. 507, 73 S. E. 126; *Griffin* v. *Griffin*, 95 Ore. 78, 187 Pac. 598; *In Re Groves*, 109 Wash. 112, 186 Pac. 300; *Kline* v. *Kline*, 57 Iowa 386, 10 N. W. 825; *Restatement, Conflict of Laws*, §148.)

If it appears that the circumstances upon which the prior order of another state is based have not changed and that all the facts pertinent to the question have been before the Court, New York, on principles of comity, may refuse to

decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child. (*Titcomb* v. *Superior Court*, 220 Cal. 34, 29 Pac. 2d 206.) New York is not required to give to the Florida decree the force of an estoppel, or the conclusive effect sometimes due to a judgment, but may simply regard it as a fact or circumstance bearing upon the discretion to be exercised without dictating or controlling it. (*People ex rel. Allen* v. *Allen*, 105 N. Y. 628.)

CONCLUSION

The order should be affirmed with costs.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 384.—October Term, 1946.

People of the State of New York, ex rel. Rose Halvey, Petitioner, *v.* John F. Halvey, Custodian of John Arthur Halvey.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[March 31, 1947.]

Mr. Justice Douglas delivered the opinion of the Court.

The Halveys were married in 1937 and lived together in New York until 1944. In 1938 a son was born. Marital troubles developed. In 1944 Mrs. Halvey, without her husband's consent, left home with the child, went to Florida, and established her residence there. In 1945 she instituted a suit for divorce in Florida. Service of process on Mr. Halvey was had by publication, he making no appearance in the action. The day before the Florida decree was granted, Mr. Halvey, without the knowledge or approval of his wife, took the child back to New York. The next day the decree was entered by the Florida court, granting Mrs. Halvey a divorce and awarding her the permanent care, custody, and control of the child.

Thereupon she brought this *habeas corpus* proceeding in the New York Supreme Court, challenging the legality of Mr. Halvey's detention of the child. After hearing, the New York court ordered (1) that the custody of the child remain with the mother; (2) that the father have rights of visitation including the right to keep the child with him during stated vacation periods in each year, and (3) that the mother file with the court a surety bond in the sum of $5,000, conditioned on the delivery of the child in Florida for removal by the father to New York for the

periods when he had the right to keep the child with him. 185 Misc. 52. Both the Appellate Division and the Court of Appeals affirmed without opinion. The case is here on a petition for a writ of certiorari which we granted because it presented an important problem under the Full Faith and Credit Clause of the Constitution. Article IV, § 1.

The custody decree was not irrevocable and unchangeable; the Florida court had the power to modify it at all times.[1] Under Florida law the "welfare of the child" is the "chief consideration" in shaping the custody decree or in subsequently modifying or changing it. *Frazier* v. *Frazier*, 109 Fla. 164, 169, 147 So. 464, 466; See *Phillips* v. *Phillips*, 153 Fla. 133, 134–135, 13 So. 2d 922, 923. But "the inherent rights of parents to enjoy the society and association of their offspring, with reasonable opportunity to impress upon them a father's or a mother's love and affection in their upbringing, must be regarded as being of an equally important, if not controlling consideration in adjusting the right of custody as between parents in ordinary cases." *Frazier* v. *Frazier*, 109 Fla. p. 169. Facts which have arisen since the original decree are one basis for modification of the custody decree. *Frazier* v. *Frazier*, 109 Fla., p. 168; *Jones* v. *Jones*, — Fla. —, 23 So. 2d 623, 625. But the power is not so restricted. It was held in *Meadows* v. *Meadows*, 78 Fla. 576, 83 So. 392–393, that "the proper custody of the minor child is a proper subject for consideration by the chancellor at any time, even if facts in issue could have been considered at a previous hearing, *if such facts were not presented or con-*

[1] "In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security to be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order touching their custody as their best spiritual as well as other interests may require." Fla. Stats. (1941) § 65.14.

entered at a former hearing." (Italics added.) Or, as stated in *Frazier* v. *Frazier*, 109 Fla., p. 168, a custody decree "is not to be materially amended or changed afterward, unless on altered conditions shown to have arisen since the decree, or because of material facts bearing on the question of custody and existing at the time of the decree, but which were unknown to the Court and then only for the welfare of the child." The result is that custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere, except as to the facts before the court at the time of judgment. *Minick* v. *Minick*, 111 Fla. 469, 490-491, 149 So. 483, 492.

Respondent did not appear in the Florida proceeding. What evidence was adduced in that proceeding bearing on the welfare of the child does not appear. But we know that the Florida court did not see respondent nor hear evidence presented on his behalf concerning his fitness or his claim "to enjoy the society and association" of his son. *Frazier* v. *Frazier*, 109 Fla., p. 169. It seems to us plain, therefore, that under the rule of *Meadows* v. *Meadows*, *supra*, the Florida court would have been empowered to modify the decree in the interests of the child and to grant respondent the right of visitation, if he had applied to it rather than to the New York court and had presented his version of the controversy for the first time in his application for modification.

So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. Article IV, § 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Congress by the Act of May 26, 1790, c. 11, as amended, R. S. § 905, 28 U. S. C. § 687 declared that judgments "shall

have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The general rule is that this command requires the judgment of a sister State to be given full, not partial, credit in the State of the forum. See *Davis* v. *Davis*, 305 U. S. 32; *Williams* v. *North Carolina*, 317 U. S. 287. But a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered. See *Reynolds* v. *Stockton*, 140 U. S. 254, 264. If the court of the State which rendered the judgment had no jurisdiction over the person or the subject matter, the jurisdictional infirmity is not saved by the Full Faith and Credit Clause. See *Thompson* v. *Whitman*, 18 Wall. 457; *Griffin* v. *Griffin*, 327 U. S. 220. And if the amount payable under a decree—as in the case of a judgment for alimony—is discretionary with the court which rendered it, full faith and credit does not protect the judgment. *Sistare* v. *Sistare*, 218 U. S. 1, 17. Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (Cf. *Williams* v. *North Carolina*, 325 U. S. 226, 230), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.

In this case the New York court, having the child and both parents before it, had a full hearing and determined that the welfare of the child and the interests of the father warranted a modification of the custody decree. It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida.

The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e. g.*, whether Florida at the time of the original decree had jurisdiction over the child,[2] the father having removed him from the State after the proceedings started but before the decree was entered; whether in absence of personal service the Florida decree of custody had any binding effect on the husband; whether the power of New York to modify the custody decree was greater than Florida's power; whether the State which has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all these problems we reserve decision.

Affirmed.

MR. JUSTICE JACKSON concurs in the result on the ground that the record before us does not show jurisdiction in the Florida court.

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[2] The legal domicile of the child is usually the domicile of his father. *Minick* v. *Minick*, 111 Fla., p. 490; *Dorman* v. *Friendly*, 146 Fla. 732, 738, 1 So. 2d 734, 736. The power of the Florida courts to award custody of a child is dependent either on the child being legally domiciled in Florida or physically present there. *Dorman* v. *Friendly*, *supra*; *State ex rel. Clark* v. *Clark*, 148 Fla. 452, 4 So. 2d 517.

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[March 31, 1947.]

Mr. Justice Frankfurter, concurring.

Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law. And so, the use of the same legal words and phrases in enforcing full faith and credit for judgments involving the two types of relations ought not to obliterate the great difference between the interests affected by them, and should not lead to an irrelevant identity in result.

The constitutional policy formulated by the Full Faith and Credit Clause cannot be fitted into tight little categories or too abstract generalities. That policy was the nation-wide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another. Such limitation does not foreclose inquiry into what was litigated and what was adjudicated. The scope of the Full Faith and Credit Clause is bounded by its underlying policy and not by procedural considerations unrelated to it. Thus, in judgments affecting domestic relations technical questions of "finality" as to alimony and custody seem to me irrelevant in deciding the respect to be accorded by a State to a valid

prior judgment touching custody and alimony rendered by another State. See the concurring opinion in *Barber* v. *Barber*, 323 U. S. 77, 86, and the dissenting opinions in *Griffin* v. *Griffin*, 327 U. S. 220, at 236 and 248. Compare *Yarborough* v. *Yarborough*, 290 U. S. 202.

Which brings me to the present case. If there were no question as to the power of Florida to provide for the custody of this child in the manner in which the Florida decree of divorce did, I think New York would have to respect what Florida decreed, unless changed conditions affecting the welfare of the child called for a change in custodial care. New York could respond to such changed circumstances. The child's welfare must be the controlling consideration whenever a court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by Florida could not be set aside simply because a New York court, on independent consideration, has its own view of what custody would be appropriate.

Here the lower New York court did not provide for the child's custody on the basis of changed circumstances. While it professed to respect the Florida custody decree, the court acted as though it had independent authority because of the dispersion of the family. Its action seemed to be controlled by the father's right, on the assumption that that was the test of the child's welfare in the circumstances. The order of the lower court was affirmed by the Appellate Division, but that court specifically noted that it did "not adopt in their entirety the views expressed" by the court below. The intermediate tribunal was in turn, affirmed by the Court of Appeals. Of course, if the Florida decree is entitled to no respect, it is not for us to upset the custodial provisions sanctioned by the highest court of New York. Although we are not afforded the guidance that an opinion would give as to the considerations that moved the New York Court of

Appeals to sustain the custodial decree, on the slim record before us I am not justified in finding that the New York Court of Appeals was unmindful of its duty under the Full Faith and Credit Clause to respect a valid Florida judgment.

In determining whether the New York judgment should stand or fall account must be taken of two competing considerations. There is first the presumptive jurisdiction of the court of a sister State—here Florida—to render the judgment for which full faith and credit is asked. The other is the power of a State court—here New York—which has actual control of the child to make provision for the child's welfare. Where, as here, both considerations cannot prevail one must yield. Since the jurisdiction of the Florida court in making the custodial decree is doubtful, New York was justified in exercising its power in the interest of the child. *Williams* v. *North Carolina*, 325 U. S. 226.

A close analysis of the precise issue before us seems to me to require this conclusion. The problem before this Court is the validity of a New York judgment providing for the custody of a child subject to its jurisdiction because within its power. It is our duty to sustain that judgment unless there is clear ground for upsetting it. Apart from the effect of what Florida had previously done, New York's authority to enter this judgment is unquestioned. New York's power is qualified only by her duty under the Full Faith and Credit Clause to respect a Florida judgment. But this duty arises only if there was legal power in the Florida Court to enter the custodial decree, and if in the Florida courts themselves the decree was not subject to the kind of modification which New York here made. On the basis of the meager record before us and in view of the uncertainties of Florida law, we do not have the necessary assurance that Florida had jurisdiction to issue the custodial decree, or that the Florida courts could not enter

a modifying decree precisely like the New York decree before us. So long as there is this uncertainty, we are not justified in finding that New York's judgment was vitiated because of a failure in her duty under the Full Faith and Credit Clause. A full record of the Florida proceedings in the light of applicable Florida law, more securely ascertained than by our independent inquiry, might lead to a different conclusion. As it is, I concur in affirmance of the judgment.

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Mr. Justice Rutledge, concurring.

I join in the judgment *dubitante*, in the view that under Florida law *res judicata* has no application to an award of custody[1] and the decree therefore is lacking in any quality of finality which would prevent the court rendering it, or another acquiring jurisdiction of the child's status, from altering it.[2]

The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare. And, if possible, I would avoid such a distressing result, since I think that the controlling con-

[1] In *Minick* v. *Minick*, 111 Fla. 469, 491, the Florida Supreme Court quoted with approval the statement in Schouler on Marriage and Divorce (6th ed.) § 1896: "These judgments [of custody] are necessarily provisional and temporary in character, and are ordinarily not *res judicata*, either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment." See also *Meadows* v. *Meadows*, 78 Fla. 576.

[2] The trial court in New York gave lip service to observing the Florida award of custody to the mother, but awarded the father rights "of visitation" not allowed under the Florida decree; and these included not only visitation during specified hours while the child is to remain in the mother's custody, but also the right to have the custody during more than three months of each year, during which time the mother was given specified visiting rights. The New York appellate courts affirmed the award as made by the trial court.

sideration should be the best interests of the child, not only for disposing of such cases as a matter of local policy, as it is in Florida and New York,[3] but also for formulating federal policies of full faith and credit as well as of jurisdiction and due process in relation to such dispositions.

I am not sure but that the effect of the decision may be that the mother, once the child has been returned to Florida,[4] will then be able to secure another decree there nullifying the father's rights of visitation and custody given by the New York decree,[5] or that in such an event he might lawfully repeat the abduction and secure restoration of those rights in New York. If so, the effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters.

But our function here is limited to application of the full faith and credit clause. I agree that technical notions of finality applied generally to other types of judgment

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[3] See Fla. Stat. Ann. (1943) § 65.14; *Jones* v. *Jones*, 156 Fla. 524, 527; *Green* v. *Green*, 137 Fla. 359, 361.

See *Matter of Rich* v. *Kaminsky*, 254 App. Div. 6; Matter of Bull, 266 App. Div. 290, aff'd, 291 N. Y. 792; see also N. Y. Domestic Relations Law § 70; *Finlay* v. *Finlay*, 240 N. Y. 429, 433.

[4] The New York judgment permits the mother to take the child to Florida during the time she is to have custody, see note 2, but requires her to give a surety bond conditioned upon her surrendering the child to the father at the beginning of the periods prescribed for his having custody.

The mother therefore consistently with the New York decree may lawfully remove the child to Florida. Once he is physically and lawfully present there, it would seem that the courts of that state would be able to acquire jurisdiction over his status and to make further awards concerning it, unless indeed personal service of process upon the father is required for that purpose.

[5] See notes 2, 4. The question would remain whether the Florida courts by making a further decree could relieve the mother of the compulsion of the surety bond.

for such purposes have no proper strict application to these decrees.[6] But, even so, full faith and credit is concerned with finality and only with finality when the question arises in relation to the binding effects of judgments. And the law is clearly settled that while generally the clause requires other states to give judgments as much effect as they have where rendered, it does not require them to give more.[7]

Accordingly, if the state rendering the judgment gives it no final effect to prevent its alteration, I am unable to see how others having jurisdiction of the parties and the subject matter may be required to give it finality in this respect by virtue of the provision for full faith and credit.[8] But this is what we would have to require, in view of the state of Florida law, in order to hold that New York could not make the changes which were incorporated in its judgment.

Whether Florida will be bound to observe those changes, in the event of another application by Mrs. Halvey, is a question upon which however I desire to reserve judgment, along with the other questions reserved in the Court's opinion.

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[6] See the opinion dissenting in part in *Griffin* v. *Griffin*, 327 U. S. 220, at 247; also the concurring opinion in *Barber* v. *Barber*, 323 U. S. 77, at 86.

[7] Rev. Stat. § 905, 28 U. S. C. § 687, and cases cited in *Griffin* v. *Griffin*, 327 U. S. 220, 236, note 1.

[8] Commentators who have suggested that full faith and credit be given to custody decrees have assumed that such awards could be modified only on the basis of new facts occurring subsequent to the original custody decree. See, *e. g.*, Effect of Custody Decree in a State Other Than Where Rendered (1933) 81 U. Pa. L. Rev. 970, 972. As the opinion of the Court points out the power of Florida to modify such a decree is not limited to change of circumstance. See also note 1.